IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941.

J. E. PIERCE,
Petitioner,
vs.
UNITED STATES OF AMERICA.

No. 36.

SUPPLEMENTAL AND REPLY BRIEF FOR PETITIONER.

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INDEX.

Page

Preliminary Statement:

(a) Correction in original brief 1, 2

(b) Page omitted from original brief 2, 3

Reply to Statement in Government brief:

(a) No evidence petitioner promised "Government" would match contributions 4-6

(b) Checks not read by witnesses who stated that word "advertisement" was written thereon after check signed 6-9

Reply to Government Argument:

(a) Testimony that petitioner claimed to represent Government mere conclusion of witnesses 10-15

No Substantial Evidence of False Impersonation:

(a) Authorities cited and discussed 15-19

(b) Analysis testimony of Government witness Simpson 19-21

(c) No sound basis for any conclusion—That petitioner claimed to represent the Government or the TVA 21-23

(d) Bits and fragments of evidence not adequate basis for correct conclusion 23-25

(e) Material part of the Government testimony inherently improbable 24-26

Refusal of Petitioner's Special Request clear Error 27-33

False Impersonation gist of both offenses created by Cr. Code Section 32 33-35

Conclusion 36-38

TABLE OF CASES.

	Page
American Bell Telephone et al. vs. Peoples Telephone Co. et al., 22 Fed. 309	19
Baas v. United States, 25 F2d, 294 (C. C. A. 5)	34
Connally v. General Construction Co., 269 U. S. 385	33
Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197, 229	16, 17
Delaney v. United States, 263 U. S. 586, 589, 590	16
Fasulo vs. U. S., 272 U. S. 620	32
Federal Trade Commission v. Education Society, 302 U. S. 112	23
Goodyear Tire & Rubber Co. v. Federal Trade Commission, 101 F2d, 620, 624 (C. C. A. 6)	16, 17
Hilderbrand v. Chicago B. and Q. R. R. Co. 45 Wy. 175, 17 Pac. (2d) 651	16
H. P. Coffee Co. v. Reid Murdock Co., 60 F2d 387, 388	27
Johnson v. C. N. O. T. U. P. Ry. Co. 146 Tenn. 135, 157, 158, 240 SW 429	36
King v. U. S. 279 Fed. 103 (C. C. A. 5)	35
Lamar vs. U. S. 241 U. S. 103	34
Littell v. U. S. 169 Fed. 620 (C. C. A. 9)	34
Messinger v. Anderson, 225 U. S. 436, 443-445	27
Mississippi Valley Trust Co. v. Begley, 310 Mo. 28, 275 SW. 540	16
O'Laughlin v. Helvering, 81 F2d 269 (D. C. Court of Appeals)	16, 17

TABLE OF CASES—(Continued).

Page

Penn. Railroad Co. v. Chamberlain, 288 U. S. 333, 342, 343 ..... 18, 26

Quick Tong v. U. S., 140 U. S. 417 ..... 16, 17

State v. Gregory, 339 Mo. 133, 96 SW (2d) 47, 52, 53 ..... 16, 17

State of Kansas v. Occidental Life Ins. Co., 95 F2d 935, 936 (C. C. A. 10) 27

Thompson Administratrix vs. Maxwell Land Grant & Railway Co., 168 U. S. 451, 456 27

Throckmorton v. Holt, 180 U. S. 551 19

United States v. Barnow, 239 U. S. 74, 36 S. Ct. 19, 60 Law Edition 155 34

United States v. Katz, 271 U. S. 354 33

United States v. McCarl, 275 U. S. 1, 72 L. Ed. 131 ..... 29, 31

United States v. Noveck, 271 U. S. 201 33

United States v. Socony-Vacuum Oil Company, 310 U. S. 150, 254 15

United States v. Strang, 254 U. S. 491, 65 L. Ed. 368 29

United States v. Walter, 263 U. S. 15, 18 30

United States v. Wiltberger, 5 Wheaton 73, 5 L. Ed. 37 33

Washburn, etc., v. Beat 'Em All Barb Wire Co., 143 U. S. 375 19

Woolworth Co. v. Davis, 41 F2d 342, 347 (C. C. A. 10) 16

Worthington v. U. S., 64 F2d 936 (C. C. A. 7) 37

TEXT BOOKS.

Page

Jones on Evidence, 2nd Ed., Vol. 3, Sec. 1070, p. 1769 ..... 19, 25

Wigmore on Evidence, 3rd Ed., Vol. 6, Sec. 1732, p. 102 37

Wigmore on Evidence, 3rd Ed., Vol. 3, Sec. 729, p. 63 22

STATUTES.

U. S. C. A., Title 16, Ch. 12 a., Sec. 831, et seq. 29

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Preliminary Statement.

Preliminary to a reply to the brief for the United States, attention is directed to the omission of the word "not" in line five from the top of page five of petitioner's original brief in quoting from the testimony of the witness Roach with respect to the expression "TVA Units." As appears in the record, Roach thus testified:

> The first time I ever heard the expression "TVA Units" was after we were arrested in Gibson County. Such an expression was never used by Mr. Pierce in my presence in the presentation of his plan. *He did speak* of "units of advertising"—was divided into 240 units—the plan called for the public underwriting

> $1400.00 and the newspaper underwriting $1000.00. Mr. Pierce did not tell anyone in my presence that the Government would match the funds contributed by the sponsors."

There are other typographical errors in petitioner's original brief but as these errors are either obvious or do not materially change the meaning of the language used or quoted, they will not be directed to the attention of the Court.

In sending the manuscript of the original brief to the printer there was omitted a page therefrom that should have followed page 37 and as that page furnished a connecting link between the preceding discussion of the testimony of the Government witness Anderson and the reference to the testimony of petitioner's witness Bringle (Brief 38) we produce it here.

"Petitioner's advertising campaign had one objective in common with the Tennessee Valley Authority, to-wit, the promotion of cheaper power in rural communities.

Failure to distinguish between an officially sponsored program and a newspaper enterprise, having a common objective, this failure being the result of superficial observation and careless listening, is doubtless the key to the unwarranted conclusion reached by Anderson as to the capacity in which petitioner was acting.

But in the absence of any specific inquiry as to the relation, if any, which petitioner sustained to the Federal Government or any suggestion by Anderson that he was under the impression that petitioner was acting in an official capacity, there is no factual basis on which pe-

titioner can be held responsible for the confusion or misunderstanding of Anderson. The check which Anderson signed was written by his bookkeeper, not by petitioner. It was payable to petitioner's newspaper and showed that it was given 'for advertising.' Petitioner's connection with that paper had been previously disclosed to Anderson. The receipt, which was also given Anderson's bookkeeper in the presence of the latter, was not folded but open, and this receipt was on the printed billhead of the paper. (R. 28, 35, 37.) What more should petitioner have done to show the capacity in which he received the money and the purpose for which it was paid to him? And upon what theory consistent with fairness and justice can petitioner be held responsible for a misunderstanding on the part of Anderson, reached under the circumstances stated?

It would serve no useful purpose to make a detailed analysis of the testimony of other witnesses who reached the conclusion without justification that petitioner represented the Federal Government. However, we shall refer to a few additional facts and circumstances that support our contention that the Government testimony consists of hasty impressions and unwarranted conclusions that present no substantial conflict with the crushing weight of opposing testimony.

Many of the Government witnesses testified that TVA and cheaper power 'meant the same thing to them' (R. 40, 47, 51, 69, 71, 78, 79, 124, 329)."

Statement in Government Brief.

Bits of evidence and conclusions of witnesses are so blended at pages 6 and 7 of the Government brief as to present a picture that is materially different from that actually presented by the record.

To illustrate:

> At page 6, referring to petitioner, it is said:
> "He explained that the Government would match, dollar for dollar, the contributions which the citizens of the county made (R. 24, 27, 31, 44, 54-55, 59, 66, 69, 74, 77, 81, 107, 116, 120)."

(a) Pages 24, 27, and 31 of the record citations in the above quotation refer to the testimony of the witness Anderson. This witness did not pretend to be able to state the exact language used by petitioner (R. 33). It has been heretofore shown (see petitioner's brief pages 34-37) that his conclusions were without adequate factual basis. Therefore his testimony will not be further discussed.

(b) The citation of record pages 54, 55, refers to the testimony of the Government witness Witt, his testimony relating to Count 2. This witness, in answer to a direct question, testified that he was not positive as to whether petitioner said "we" or used the word "government" with respect to contributions that would be matched (R. 54-55). This witness further testified that his recollection when he testified at Medina, two or three days after the transaction occurred, was clearer than when he gave his testimony at the trial. It appears without dispute that in his Medina testimony he stated positively that he did not "remember" petitioner saying

anything about the "United States Government" (R. 55, 287).

(c) The citation of record page 59 refers to the testimony of the Government witness Utley, relating to Counts 4 and 5. Utley did not testify that petitioner so much as mentioned the "government" in his conversation with that witness, and quoted him as using the word "*we*" with respect to supplementing contributions made by the community.

(d) The citation of record pages 66 and 69 refers to the testimony of the Government witness Blackman, relating to Counts 14 and 15. This witness did testify on direct examination that petitioner said the Government would match contributions but when his attention, on cross examination, was directed to the language actually used by petitioner, he stated that petitioner said "we", not the Government, and that his conclusion that petitioner meant the Government was based on the witness' observation of the word "TVA" as a feature headline in one of the newspapers exhibited to the witness. (R. 70-71.) Incidentally, it may be stated that among the papers exhibited to the prospects from whom funds were solicited, things other than the TVA were featured in the headlines, "TVA" as a feature headline, or one that spread across the entire page, appearing in only one of the many papers in the bundle used in demonstrating the plan (R. 199).

(e) The citation of pages 74 and 77 refers to the testimony of the Government witness Simpson, relating to Counts 11 and 12. But this witness at the preliminary hearing at Medina, when the matter was fresh in his recol-

lection, did not testify that the Government would match contributions but that these would be supplemented by the "*concern*" with which petitioner "*was connected*" (R. 288).

(f) Page 120 is the only additional citation of the record in the above quotation from the Government brief that refers to the testimony of an indictment witness. The reference is to the testimony of Conyers, relating to Counts 16 and 17. But neither at that page nor any other does Conyers quote petitioner as saying the "Government" would supplement contributions.

For the sake of brevity, and because such is more material than that of other Government witnesses, we have restricted our discussion of the statement quoted from the government brief to the testimony of indictment witnesses, that is those testifying directly to a transaction involved in the indictment, and it is clear from an analysis of their testimony that petitioner did not state that the Government would match or supplement contributions made by local communities, but that this was a mere conclusion of these witnesses that resulted from the statement actually made by petitioner that "we", meaning his paper, would take care of a stated proportion of the costs of the advertisements of the counties. (R. 151, 168, 250.)

At page 7 of their brief, government counsel, referring to petitioner, say:

> "On at least three occasions he stated that he was required to make daily reports to Washington (R. 25, 61, 132)."

Only one of the foregoing citations of the record refers to an indictment witness, this being Harris Utley, and we shall briefly state his and other related testimony on the point represented in the above quotation.

At the first trial Utley testified that petitioner, in refusing the witness credit, said he had to "wire the money in every night" (R. 61). He supplemented this statement at the present trial by further testifying that he heard petitioner state to Joe Luckey, one of the Government witnesses, at Medina that he could not make a refund of $10.00 to that witness because he "wired the money to *Washington* every night" (R. 61). Luckey, however, recalled and asked about this statement, reiterated the testimony that he had given at Medina almost contemporaneous with the claimed conversation, in which he testified that defendant said the money "had gone into headquarters in *Alabama*" (R. 65).

In explanation of his new testimony in regard to the disposition of funds by Pierce, Utley stated that he did not tell at the first trial what petitioner said to Joe Luckey because he did not think it would be competent (R. 61). Here is what, according to the testimony of the court reporter, Utley actually testified at the first trial as to the wiring of funds:

> "Q. Did he say, (referring to Pierce) where he had to wire it to?
>
> A. No, sir, he did not say where he had to wire it to. He just said he had to wire the money in every night." (R. 234.)

At page 8, referring to a letter written on the stationery of the Huntsville Daily Register, signed by the corporation publishing that paper through William H.

Pierce, its president, and stating various business and civil enterprises with which petitioner was connected and the work he was undertaking in behalf of that paper, government counsel said:

> "In one instance, however, petitioner apparently offered it as a credential of his status as a government representative (R. 81-83)."

The record citation refers to the testimony of the government witness J. T. Mathis. With respect to the testimony of this witness it is the contention of petitioner that the inherent improbability that he would claim that this letter was a government credential and submit it as such for the inspection of a person who asked for his government credentials, is strengthened by an examination of the testimony of Mathis. For instance, among other things, he states that it was submitted as a government credential in the presence of the government witness Graves and petitioner's witness Roach and that he stated very emphatically in the presence of these witnesses that the letter thus submitted for inspection was not a government credential (R. 82). Graves did not corroborate him. Petitioner and Roach directly contradicted him.

At page 8 of the Government brief this statement is made:

> "The checks which were introduced at the trial also bore on their face the words "For Advertising" in petitioner's handwriting, but three of the witnesses stated positively that the words had not been on the checks when they had signed them (R. 67, 92-93, 122)."

All the checks were not in petitioner's handwriting. (R. 28, 208, 244). But that is not the point stressed in reply to the above statement. True it is that three of the witnesses testified that the words "for advertising" were not on the checks when they were signed by the witnesses but it is equally true that each of these three witnesses testified that he did not observe to whom the check was payable nor read it further than to observe the amount for which it was payable (R. 73, 98, 99, 122, 128, 129). To emphasize the point stated we quote from the testimony of one of these witnesses, Frank Blackman, on direct examination.

> "Q. Did you notice who it was made payable to?
> A. No, sir.
> Q. Did you notice the word 'advertising' on it?
> A. No, sir, that wasn't on there." (R. 67.)

On cross examination Blackman thus testified:

> "I gave him a check and since I have read it I see it is payable to the Huntsville Register or bearer. *I didn't read the check when I signed it.* I just saw the $20.00 on there. There was nothing to have kept me from reading the check. It was plain daylight, around 5:00 o'clock when I signed it. The receipt was on the printed billhead of the Huntsville Daily Register and I had no difficulty in understanding what it was for when I read it. Mr. Pierce may have stayed about 15 minutes.
>
> Q. And the check and the receipt were all parts of the same transaction in which you paid him the money?
>
> A. Yes, sir, I gave him a check and he gave me a receipt. (R. 73.)

I.

THE GOVERNMENT ARGUMENT.

At page 19 of their brief government counsel said:

> "From the foregoing it appears that with respect to at least six of the fifteen counts upon which the petitioner was convicted (9, 10, 11, 12, 20 and 21) the proof showed that the petitioner had explicitly declared that he was a representative of the Government. The testimony of witnesses who were allegedly defrauded, according to three other counts (2, 14, and 15), was that the petitioner had told them that he was selling TVA units and that the Government would match their contributions."

With respect to the claimed testimony that the "Government" would match contributions, we have heretofore shown that such testimony was a mere conclusion and nothing more.

The assertion of government counsel that the proof shows that petitioner "explicitly declared that he was a representative of the Government" with respect to the transaction involved in Counts 9, 10, 11, 12, 20 and 21 is also destitute of any sound factual basis.

Counts 9 and 10 relate to a transaction with the Government witness, Clarence Luckey. This witness testified that he did not fully understand the plan when it was presented to him; that he was stating his understanding thereof without any "ability to recall the exact language that was used" (R. 110, 112); that he paid little or no attention to the newspaper demonstration; that he did not recall what was said about good roads or the development of the natural resources of the com-

munity or about advertising (R. 111). He stated that his recollection as to what was said was much clearer when he testified at the preliminary hearing and it appears that at that hearing Luckey testified that petitioner "pulled out a newspaper and talked something about some kind of advertising" (R. 288).

Counts 11 and 12 relate to a transaction with the government witness, J. H. Simpson, who testified that petitioner stated that he was "representing the Government" and that the "Government would match" community contributions. This witness testified in a preliminary hearing at Medina shortly after his transaction with petitioner.

It appears from the transcript of the Medina testimony that Simpson there testified that petitioner said he was "putting on a program to help get Muscle Shoals power through this community," and that the community would unt up $1,400 and the "concern with which he (Pierce) was connected would put up the balance." (R. 288).

Simpson testified that his recollection as to what was said by petitioner was much clearer when he testified at Medina than it was at the time of the trial (R. 80); and this, according to his own admission, is the testimony he there gave when the matter was fresh in his recollection.

> "Question: Do you recall seeing this Mr. Roach here and Mr. Pierce over there yesterday or day before?
>
> Answer: Day before yesterday evening.
>
> Question: Where were you?
>
> Answer: Tomato patch, when I was called out.

Question: Ever met them before?
Answer: No.
Question: What did they say to you when they came up?
Answer: Well, they just hollowed 'hello, John.'
Question: Is that your given name?
Answer: Yes.
Question: Then what did they do?
Answer: They said they was in here working in the interest of TVA.
Question: Did they want to sell you anything or not?
Answer: Some units for Muscles Shoals.
Question: Did they explain to you what a unit was?
Answer: No, really didn't.
Question: What did they propose to do if you would buy a unit?
Answer: They said it would help to get Muscle Shoals or the lights in here, and if I would buy a unit, why they would give just as much as I would buy, the other in connection with it.
Question: How much did you buy?
Answer: I bought two units.
Question: Paid them $20.00?
Answer: Yes.
Question: What did they do as soon as you paid them?
Answer: Handed me a receipt and was gone.
Question: Did they write that out before you?
Answer: Yes, right over the fence from me.
Question: What bank was your check drawn on?
Answer: Medina Banking Company." (R. 79, 80.)

On the second trial Simpson in response to a direct question by the District Attorney as to whom petitioner claimed to represent answered: "He was representing the TVA; Muscle Shoals." (R. 327).

Counts 20 and 21 relate to a transaction with J. B. Cherry. On direct examination, speaking of petitioner, he said:

> "He told me the purpose he was there for—there in the interest of the Government, selling the people of Crockett County TVA Units or Stock." (R. 91.)

On cross examination he admitted that petitioner did not say anything about "stock" (R. 27). During his cross examination, however, he quoted petitioner as saying he was "representing the Federal Government; selling TVA Units" (R. 96). But with respect to the language used by petitioner, Cherry further testified:

> "Well that has been three years ago, and I might not quite (quote) just exactly—you don't remember three years what you said to a man, and what he said to you." (R. 97.)

It also appears from Cherry's testimony that petitioner informed the witness that he would receive a newspaper and discussed with him at some length the question of advertising (R. 96-98). Furthermore, Cherry, on the second trial, when asked to detail the statement made by petitioner, did not mention the word "Government" but thus testified:

> DIRECT EXAMINATION:
>
> "Q. Go ahead in your own way and tell the jury all conversations from the time you first saw him; who introduced you, if anyone; who was with him and the exact conversation that took place between anybody there on that occasion?
>
> A. Well, Mr. Pierce and Mr. Roach had been down at my home and I was away from home . . . and he (Mr. Pierce) was in the car and met me in the highway in the road and stopped and threw up his

hands, and this man Pierce got out of the car and I got out of my car, too. When I come up close he said 'hello, J. B.' That's my initials, J. B., and he was so friendly to me and talked so nice to me and I looked at him the second time and I said 'you have the advantage of me; I don't believe I know you.' He introduced himself to me then and told me his position. He said he was there to sell some TVA units or stock to us farmers of Crockett County and other counties and insisted on me taking $100.00 worth of units—stock in TVA.

CROSS EXAMINATION:

Q. He told you he was carrying on a campaign promoting better roads and lower taxes and cheaper power, didn't he?

A. He said something about we would have better roads and cheaper taxes, yes, sir." (R. 330.)

Cherry was a Deputy Sheriff of Crockett County, this being known to petitioner (R. 94). Petitioner's conversation with Cherry occurred in the presence of another Deputy Sheriff who accompanied him in his canvass of Crockett County (R. 93).

Cherry's check showed that it was given "for advertising". The receipt, which Cherry admits he glanced over, was on the printed billhead of the Huntsville Daily Register and plainly showed the purpose for which the money was received by petitioner (R. 100, 101).

The record shows that petitioner was a man of superior qualifications as a solicitor of advertising and it is the theory of the Government (Brief page 10) that he was making in many instances a "self serving record". If this be true, is it not inherently improbable

that under the circumstances disclosed by the testimony of Cherry, a deputy sheriff, that petitioner would have falsely represented to that witness, in the presence of another Deputy Sheriff, that he was a representative of the Federal Government and have furnished him a written record that would show and probably result in immediate detection and exposure of the false impersonation of an officer of the Federal Government?

In selecting individual words or phrases from the testimony of various witnesses, and in assembling these fragmentary utterances in an apparently connected whole, government counsel build a premise which, as we construe the evidence, leads to a wrong conclusion. We therefore feel justified in such further discussion of the facts as seems reasonably necessary to establish the unsound premise on which the Government rests its conclusion that the verdict is sustained by substantial evidence.

NO SUBSTANTIAL EVIDENCE OF FALSE IMPERSONATION.

Before further discussing the facts, we shall briefly state the applicatory law as we conceive it.

1. Where a motion for a directed verdict, duly made, is considered by the trial court and the Circuit Court of Appeals, and certiorari is granted by this Court, the facts will be considered not for the purpose of weighing the evidence but to ascertain whether there is any "competent and substantial evidence" to sustain the verdict. U. S. v. Socony-Vacuum Oil Co., 310 U. S. 150. The Government brief at pages 14 and 15 thereof apparently

contends that this court is bound by the conclusion of the lower courts as to the sufficiency of the evidence, and cites Delaney v. United States, 263 U. S. 586, 589, 590 on the point stated. No such rule was pronounced in the Delaney case but it was there said that it required "something more than ingenious criticism" of the evidence by counsel to warrant this court in setting aside a verdict that had been approved by the lower courts. There is no conflict between the holding in the Delaney case and the later decision in the Socony-Vacuum Oil Case. Certiorari being a discretionary writ, it may be that this court would not grant it if no question other than the sufficiency of the evidence was presented but having taken jurisdiction, there is no sound reason why this Court should not consider the facts to the extent indicated in the Socony-Vacuum Oil Company case.

(2) To be classified as "substantial", the evidence must be competent, credible, and such as a reasonable mind might accept as adequate to support a conclusion. Edison Company v. National Labor Relations Board, 305, U. S. 197, 229; Quick Tong v. U. S., 140 U. S. 417; Woolworth Co. v. Davis, 41 F2d 342, 347 (C.C.A. 10); O'Laughlin v. Helvering, 81 F2d 269 (D. C. Court of Appeals); Goodyear Tire and Rubber Co. vs. Federal Trade Commission, 101 F2d 620, 624; Mississippi Valley Trust Co. v. Begley, 310 Mo. 28, 275 S. W. 540; Hilderbrand v. Chicago B. and Q. R. R. Co. 45 Wy. 175, 17 Pac. (2d) 651; State v. Gregory, 339 Mo. 133, 96 SW (2d) 47, 52, 53.

In Edison Co. v. National Labor Relations Board, supra, this Court said:

> "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

And this in Quick Tong v. U. S., supra:

> "There may be such inherent improbability in the statement of a witness as to induce the court or jury to disregard it, even in the absence of any direct conflicting testimony."

In Goodyear Tire and Ruber Co. v. Federal Trade Commission, supra, the Court of Appeals for the 6th Circuit said:

> "The persuasiveness of evidence may upon occasion be destroyed by analysis even though uncontroverted." (101 F2d 624.)

In State vs. Gregory, supra, the court, citing decisions from this court and stating that the rule in Missouri was in harmony therewith, said:

> "Now, since the test of substantial evidence is whether a jury reasonably could find the issue thereon, the result must depend in some measure on the degree of persuasion required. In a criminal case liberty and sometimes life are involved, and there cannot be a conviction except upon a finding of guilt beyond a reasonable doubt. Necessarily, therefore, it becomes the duty of an appellate court as a matter of law to determine whether the evidence was sufficient to induce a belief of the defendant's guilt beyond a reasonable doubt in the minds of jurors of average reason and intelligence; and in resolving that question the court undoubtedly can pass on the credibility of the testimony to the extent of determining

> whether it was substantial in the sense above explained. In no other way can the rights of the defendant be protected. It would be an incongruous situation if the court were compelled to let a conviction stand as being supported by evidence warranting a verdict of guilty beyond a reasonable doubt, when for any reason made manifest on the record the evidence could not reasonably support a conviction. In so holding we are not to be understood as departing from the rule announced in the long line of recent cases cited above that this court will not weigh the evidence in a criminal case if the verdict below was supported by substantial evidence. This rule presupposes that there was evidence from which the jury reasonably could have returned a verdict of guilty."

In O'Laughlin v. Helvering, supra, speaking of the general rule that uncontradicted evidence will be accepted as true, the court said:

> "But the rule is subject to many exceptions, among which is the inherent improbability of the facts testified to. 'It is a wild conceit that any court of justice is bound by mere swearing; it is swearing credibly that is to conclude its judgment.' "

3. Where the evidence is so overwhelmingly on one side as to leave no room to doubt what the fact is, the trial court should give preemptory instructions to the jury, and no verdict, based on testimony not reasonably believable, should be sustained as against positive testimony to the contrary of unimpeached witnesses. Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333, 342, 343.

4. Testimony concerning oral statements, and particularly where the exact language of the declarant is a ma-

terial consideration, is inherently weak and dangerous. Throckmorton v. Holt, 180 U. S. 551; Washburn, etc., v. Beat 'Em All Barb Wire Co. 143 U. S. 375; American Bell Telephone Co. v. Peoples Telephone Co. et al, 22 Fed. 309; Jones on Evidence, 2nd, ed., Vol. 3, Sec. 1078, p. 1969.

Measured by the foregoing principles, the government testimony does not rise to the dignity of substantial evidence that will support a verdict.

That testimony is a hodge-podge of inconsistencies, exaggerations, contradictions and conclusions, either unsupported or resting upon a flimsy basis. Considered as a whole, the government testimony is so destitute of probative value as not to present a substantial conflict with the positive opposing testimony on the issue of false impersonation.

The testimony of J H. Simpson, relating to Counts 11 and 12, has been discussed at some length (ante p. 11). As his testimony is as strong as that of any other indictment witness, we shall further discuss it and compare it with opposing testimony to show that Simpson's testimony, upon a fair analysis thereof, does not raise a substantial conflict with that of petitioner and his witness on the issue of false impersonation as it relates to Counts 11 and 12.

On direct examination, Simpson testified that petitioner claimed to be "representing the *Government* selling TVA" (R. 73) and stated that the "*Government* would match dollar for dollar" community contributions (R. 74).

But that is only a part of his testimony.

On cross examination, Simpson testified:

(1) That petitioner exhibited newspapers to him, informed him that he would receive the paper, and offered to advertise any property he had for sale (R. 74, 75, 77, 78).

(2) That petitioner said "*he* would match dollar for dollar" community contributions (R. 77), and that petitioner told him that he was "working *in the interest* of the Government and promoting cheaper power." (R.77.)

(3) That the matter was fresher in his mind when he testifid at the preliminary hearing at Medina shortly after the transaction occurred than it was at the time of this trial (about four years later) and that in his Medina testimony he quoted petitioner and Roach as saying that "they was in here working in the interest of the TVA" (R. 79); that they wanted to sell him "some units for Muscles Shoals" (R. 80); that they did not "explain what a unit was" but said it "would help to get Muscles Shoals or the lights in here, and if I would buy a unit, why *they* would give as much as I would buy, the other in connection with it" (R. 80).

It also appears from the transcript of the testimony at the preliminary hearing that Simpson there testified that petitioner said "*he was putting on a program to help get Muscles Shoals power through this community,*" and further, that if the community would raise $1400 the "*concern with which he (petitioner) was connected would put up the balance*" (R. 288).

With respect to the transaction with Simpson, here is the evidence for petitioner:

(1) His own positive testimony that he did not claim to be a representative of the Government or the TVA nor promise that the Government or the TVA would match community contributions, but did state that he or his paper would bear part of what would be the usual cost of a series of page advertisements (R. 143, 150).

(2) The positive testimony of Roach to the same effect (R. 260).

(3) Simpson's check, signed by him, showing that it was for "advertising" (R. 74).

(4) The receipt, written in Simpson's presence (R. 80), on the printed billhead of the Huntsville Daily Register, showing the purpose for which the money was paid and received.

In considering the government testimony, it is well to bear in mind that all or most of these witnesses were either in an unusual hurry when the plan was presented to them or paid little attention to its presentation as a whole (R. 50, 70, 100, 101, 105, 110, 128, 134). "I wasn't paying much attention. *I had my mind on something else*" was the testimony of the government witness, Joe Luckey, with respect to the exhibition of newspapers, carrying page advertisements of counties previously canvassed. (R. 48.) "He (petitioner) was talking pretty fast. I was wanting to sow soy beans and *I wasn't getting all of it*" is the testimony of the government witness Frank Blackman (R. 70). "I didn't pay any attention to the demonstration of the use made there of the paper" is the testi-

mony of Clarence Luckey (R. 110). "*I didn't pay a bit of attention*" is the testimony of the government witness Couch with respect to the letters read to him by petitioner (R. 118). "I did not give it that much time" is the testimony of the government witness Conyers when asked if he made any inquiries of petitioner (R. 128). "I didn't know . . . I reckon I should have understood more about it" was the answer of Clarence Luckey when asked what he thought a "TVA Unit was" (R. 112).

In a canvass of the character made by petitioner, involving the securing of many small subscriptions, but little time could be given to the average presentation. Petitioner briefly and rapidly presented the plan, and discussion was not prolonged whether the prospect contributed or refused (R. 256).

The brevity, rapidity and character of its presentation necessarily required the undivided attention of the prospect in order that he might understand the purpose of his contribution, but that attention, as the foregoing references to and quotations from their testimony clearly show, was not given by government witnesses. As a result, their impressions or conclusions were based on fragmentary statements and not upon petitioner's conversation and demonstration as a whole. In this situation, it is not so much deficient observation or recollection but disregard of the principle of completeness that weakens the probative force of government testimony to the vanishing point. Wigmore on Evidence, 3rd. ed., Vol. 3, Sec. 729, p. 63.

It is our contention that the testimony of each witness should be considered as a whole and also in the light of undisputed facts established by other testimony, that

when so considered it clearly shows that the sales talk of petitioner was substantially the same to all prospects, this being practically conceded at page 6 of the Government brief, and that the overwhelming majority of the persons to whom this sales talk was made understood that petitioner was soliciting funds for community advertising that had as one of its objectives the promotion of cheaper power. To "pick and choose bits of evidence" that would support a finding to the contrary is to follow a practice condemned by this Court in Federal Trade Commissions v. Education Society, 302 U. S. 112, but that is apparently the course that has been followed in the preparation of the brief for the Government.

Disregarding such a method, and considering the evidence as a whole, leads inevitably to the conclusion that the verdict does not rest upon substantial evidence of guilt. A few questions, based upon indisputable evidence, will emphasize the contention stated.

(1) If petitioner pretended to be an officer of the United States or the Tennessee Valley Authority, would he also have introduced himself as the editor and publisher of a newspaper, exhibited copies of that paper, containing page advertisements of counties previously canvassed, and stressed the importance of advertising in promoting the objectives of his campaign? Such introduction, discussion and demonstration are shown by the testimony of all, or practically all, of the indictment witnesses, and by other testimony.

(2) If petitioner claimed to be selling TVA units as a representative of the Government, is it probable that he would have gone beyond the discussion of the bene-

fits of cheaper power and have emphasized the importance of good roads and lower taxes and asked permission of the subscriber to quote him in petitioner's newspaper as an advocate of these things? Such emphasis and request are clearly established by the government testimony (R. 41, 43, 47, 57, 60, 79, 330).

(3) Unless acting in behalf of a newspaper with which he identified himself, and believing that the capacity in which he thus acted was understood by the person from whom funds were obtained, is it probable that petitioner would have offered to advertise without additional cost to the subscriber any property he had for sale, and also have sought and obtained the names of the members of his family to be published in petitioner's newspaper? That such offer was made and information obtained from the subscriber appears without dispute in the record (R. 163, 166).

(4) Is it not inherently improbable that petitioner, dealing with men of the intelligence and experience of the indictment witnesses, would have offered to sell them "TVA UNITS"—something that had neither actual nor potential existence, or that he would have expected them to make a subscription therefor without either explanation or inquiry as to what a "TVA UNIT" was?

Irrespective of the obvious partisianship of many of the Government witnesses, resulting in the improper injection into their testimony of statements that petitioner "*faked*" them, "*frisked*" them, "*beat them out of their money,*" made a "*quick-get-away*" (R. 60, 89, 101) and similar expressions of bias and prejudice; their bringing of civil suits and institution of prosecution in the

State Courts, in which they were represented by the same attorney, and the numerous conferences, both before and after the magistrate's trial, in which they talked the matter over (R. 52-56, 79, 101); the reckless swearing of some of them with respect to what appeared on checks they did not read; the emphatic denial of one of them that he personally signed his check, a denial persisted in until the check, bearing his signature, was exhibited to him (R. 30); such irreconcilable contradictions as that in the testimony of M. R. Lewis, who thus testified with respect to what was done by petitioner and Roach; "They showed me some advertisements of different counties where they had worked in" . . . "they didn't show the advertisements" (R. 105); and the inconsistencies that clutter the testimony of Government witnesses, it is respectfully insisted that such testimony is not sufficiently clear and cogent to present a real conflict with the evidence adduced in behalf of petitioner.

In Jones on Evidence, 2nd Edition, Vol. 3, Sec. 1079, p. 1769; the learned author says:

> "Witnesses having the best of motives are generally unable to state the exact language of an admission, and are liable, by omission or change of words, to convey a false impression of the language used. Furthermore, no other class of testimony affords such temptations or opportunities for unscrupulous witnesses to distort the facts or commit open perjury . . ."

In this case *all the reasonable probabilities*, all the *testimony of a positive character, relating to a transaction of petitioner with an indictment witness, considered in its entirety*, and *all the documentary evidence*, including

checks personally signed by many of these witnesses and receipt placed in the hands of each of them as a part of the transaction, sustain the contention of petitioner that he was soliciting funds for publicity advertising that had as one of its objectives the promotion of cheaper power. Opposed to this is Government testimony that is a composite of impressions and conclusions, based upon faulty recollection, deficient observation and inattention, these appearing without dispute in the record, and petitioner insists that such evidence does not present a conflict with the positive testimony in his behalf. Penn. Railroad Co. vs. Chamberlain, supra.

To sustain a verdict, both law and justice require something more than shadowy conclusions, arising from prejudice or misunderstanding, and such conclusions are the sole basis for the verdict in this case.

II.

THE REFUSAL OF PETITIONER'S SPECIAL REQUEST WAS CLEAR ERROR.

The Government brief (pp. 22-33) defends this refusal on three grounds, to-wit:

(1) The instructions in the general charge (Government brief page 25). Government counsel state this ground more in the nature of a suggestion than a contention. It was fully covered and shown to be untenable in petitioner's original brief (pp. 46-50).

(2) The request contained no qualification that if petitioner, in stating that he represented the TVA, meant to convey and did convey the impression that he was an

officer or employee of the Government he could be convicted. But the point insisted upon in the qualification was included in the general charge (R. 306). There was, therefore, no need to re-state it in the special request which dealt exclusively with the status of the Tennessee Valley Authority, that is, whether it was a separate corporate entity or a department of the Government. Of course, this request should not be given a technical construction either to justify its refusal or to put the trial court in error in failing to give it.

(3) That Section 32 of the Criminal Code, as it existed when the transactions involved in the indictment took place, should be construed as extending to officers or employees of the Tennessee Valley Authority. This is the principal contention made by Government counsel in defending the refusal of the special request (Government Brief, pp 25-34). The contention thus made is not tenable. Our reasons for so stating are:

1. So far as the trial court was concerned, the construction of the statute on the first appeal established the law of the case. Thompson Administratrix vs. Maxwell Land Grant & Railway Co., 168 U. S. 451, 456; H. P. Coffee Co. vs. Reid Murdock Co., 60 F2d 387, 388; State of Kansas vs. Occidental Life Insurance Company, 95 F2d 935, 936.

It is not contended that this Court in construing the statute is restricted by the decision of the Circuit Court of Appeals on the first appeal in this case. This Court is free when the case comes here to construe the statute regardless of its construction on that appeal. Messinger vs. Anderson, 225 U. S. 436, 443-445.

But that is not the point involved in the consideration of the special request.

The principle expressed in the phrase "law of the case" rests upon sound public policy (State of Kansas vs. Occidental Life Insurance Co., supra.), and to permit the trial court in a subsequent trial to disregard the "law of the case", established in the construction of the statute, on the first appeal, violates the basic principle expressed in the rule. On the first appeal Section 32 of the Criminal Code was construed as *not* extending to officers or employees of the Tennessee Valley Authority (this construction was reiterated on the second appeal) but the holding was evaded in the trial of the case. In addition to the refusal of the request, clearly applicable to facts developed at the second trial, the evasion of the ruling of the Court of Appeals by the trial court is to some extent shown by the grouping of the counts for punishment stated and emphasized at page 20 of the Government brief.

2. But assuming that the construction of Section 32 of the Criminal Code, as it relates to officers or employees of the Tennessee Valley Authority—a corporation—is an open question in this Court as it relates to the refusal of the special request under consideration, we respectfully insist that the Government's contention that officers or employees of that corporation are included in the operation of the statute, as it existed prior to the 1938 amendment, is without merit.

The Tennessee Valley Authority, although an instrumentality of the Government which owns all its stock, is a corporate entity distinct from the government itself,

and its employees are not within the purview of Section 32 of the Criminal Code. Unitd States vs. Strang, 254 U. S. 491, 65 Law Edition, 368; United States vs. McCarl, 275 U. S. 1, 72 Law Edition, 131.

The corporation created by The Tennessee Valley Authority Act of 1933 (U. S. C. A., Title 16, Ch. 12a, Sec. 831, et seq.) is vested with the usual powers of a private corporation, including the right to "sue and be sued in its corporate name" (Sec. 831-c).

Section 831-b provides for the appointment of officers and agents of the corporation "without regard to the provisions of the civil service laws applicable to officers and employees of the United States."

As to Federal penal statutes, Section 831-t of the Act contains this provision:

> "All general penal statutes relating to the larceny, embezzlement, conversion, or the improper handling, retention, use or disposal of public moneys, or property of the United States, shall apply to the moneys or properties of the corporation, and the moneys and properties of the United States entrusted to the corporation."

Section 831-t provides penalties for the making of false entries or reports with intent to deceive any officer of the corporation, or any officer of the United States.

The foregoing exclusions and inclusions of civil and penal Federal statutes, as these affect employees of the corporation, are clearly indicative of the intent of Congress *not to include* such employees in the general Federal statutes, applicable to officers, agents and employees of the Government.

Government counsel, however, insist that the purposes and language of Section 32 of the Criminal Code are broader than those of Section 41, construed by this Court in United States vs. Strang, supra. But that contention, if conceded, does not affect the situation here. With respect to what constitutes an "officer or agent" of the United States and whether an officer or agent of a government-owned corporation is such an officer or agent, there is no material difference between Section 41, before this Court in the Strang case, and Section 32 here under consideration.

In support of their contention Government counsel rely heavily on United States vs. Walter, 263 U. S. 15, 18 (Brief p. 30).

But that case is not in point on the question presented by the refusal of the special request. It did not involve the construction of any statute as it extended to officers or agents of the Government nor the relation to the Government of officers or agents of a government-owned or government-controlled corporation. Section 37 of the Criminal Code, before this Court in the Walter case prohibits a conspiracy to "defraud the United States in any manner", and it was held that a contemplated fraud upon a government-owned corporation came within the operation of the statute. To "defraud the United States in any manner" necessarily includes a fraud that might result in a pecuniary loss or injury of any kind to the Federal Government, and this Court so held in the Walter case, but there is little or no analogy between the situation in the Walter case and that presented by the special request of petitioner.

The Fleet Corporation—a government-owned corporation—like the Tennessee Valley Authority, was an "instrumentality" of the Government. United States, ex rel vs. McCarl, 275 U. S. 105. In the McCarl case, although holding that the Fleet Corporation was an "instrumentality" of the Government and citing United States vs. Walter, supra., this court reiterated the ruling in United States vs. Strang, supra., that employees of that corporation were not agents of the United States, subject to the provisions of Section 41 of the Criminal Code.

In the McCarl case this Court recognizes the development and importance of government-owned corporations, but the decision is in disagreement, not accord, with the contention apparently made by Government counsel herein that the importance of these corporations justifies an extension by judicial construction of the provisions of prior federal statutes. Recognition of the increasing importance and activities of such corporations as instrumentalities of the government was doubtless the reason for the amendatory act of 1938, extending the scope of Section 32 of the Criminal Code so that it would reach the impersonation of officers or agents of government-owned or government-controlled corporations. But that amendment was subsequent to the acts complained of in the indictment in this case.

At page 28 of the Government brief it is asserted:

> "The only genuine question raised by this development in connection with Section 32 is whether the government corporation is generally regarded by ordinary men as a part of the government itself. This is not a question for the lawyer; it is an empirical question, and its answer is clear."

The foregoing contention at least has the merit of novelty. But that is its only merit. If it means anything it means that contemporary public opinion is the controlling consideration in construing an earlier passed penal statute.

New situations may call for a new application of statutory or constitutional provisions but that does not mean that the plain terms of a penal statute may be extended by judicial construction to include persons or acts not within its scope when it was originally passed, even though these acts may be regarded as equally or more reprehensible than those included within the operation of the statute. Fasulo vs. U. S. 272, U. S. 620.

Many of the criteria by which the meaning of a statute is to be determined are stated by this court in United States vs. Katz, infra, but these criteria do not include the opinion of "ordinary men" or any other class of men with respect to conditions arising subsequent to the passage of the statute as a test in determining its meaning.

The argument at pages 25-29 of the Government brief is one that should be directed to a legislative and not a judicial tribunal. It states sound reasons for the extension of Section 32 of the Criminal Code so as to bring within its scope the impersonation of officers or agents of Government-owned or Government-controlled corporation. Doubtless these reasons were duly considered by Congress in the adoption of the 1932 Amendment to Section 32, but that amendment was passed subsequent to the transactions involved in the indictment. Put bluntly, Government counsel are asking this Court to so construe

Section 32 as to make that amendment applicable to transactions that occurred before its passage.

At page 33, Government counsel in their brief state that the history of the 1938 Amendment is as "consistent with uncertainity regarding the scope of section 32 as it is with any belief that cases such as the instant were not covered".

But it is an established principle that penal statutes must be *certain* and that before one may lawfully be punished thereunder his case must be clearly within the provisions of the statute. Any reasonable doubt as to its meaning must be resolved in favor of the liberty of the citizen. U. S. v. Wiltberger, 5 Wheaton, 73, 5 L. Ed 37; Connally v. General Construction Co., 269 U. S., 385; U. S. v. Noveck, 271 U. S., 201; U. S. v. Katz, 271 U. S., 354; Fasulo v. U. S., 272 U. S. 620.

If the uncertainty of the statute was such as to require clarifying legislation, and that uncertainty affects acts for which petitioner was indicted, then he should not be convicted for doubtful acts committed prior to the legislation intended to make certain the meaning of the statute.

III.

FALSE IMPERSONATION GIST OF OFFENSES CREATED BY SECTION 32.

At pages 21 and 22 of their brief Government counsel apparently missed the real point in the contention made at pages 58-61 of the petitioner's original brief with respect to the overt act necessary to complete either offense denounced by section 32 of the criminal code.

In Baas vs. U. S. 25 F2d 294 (C. C. A. 5), the Court says:

> "Merely falsely pretending to be an officer or employee of the United States with intent to defraud is not enough. An overt act is necessary to complete either offense. U. S. vs. Barnow, 239 U. S. 74, 36 S. Ct. 19, 60 Law Edition 155."

The "*overt act*" need not be a legally authorized act but it must be an act in "keeping with the pretense" (U. S. vs. Barnow 239 U. S. 74, 77), or an act done in the "falsely assumed character". Lamar vs. U. S. 241 U. S. 103.

To constitute an offense under either clause of Section 32, the false claim of federal authority must be accompanied by an "act done in the pretended character" of a federal official (U. S. v. Barnow, supra). And it is not the obtaining of money, but the false impersonation that is the gist of the offense created by the second clause of the statute. Littell v. U. S. 169 Fed. 620 (C. C. A. 9).

The exhibition of papers or the collection of money to constitute "an act in keeping with the pretense" of being a federal official must be an apparent official act, and this is as necessary under the second as under the first clause of Section 32. In Lamar v. U. S., supra., this court said:

> ". . . last clause of the section makes criminal the demanding or obtaining in the *assumed capacity* which the first clause prohibits, 'from any person or from the United States, . . . any money, paper, document, or other valuable thing . . .' We say which the first clause prohibits because there is no re-expression of the prohibition against assuming or

> pretending contained in the first clause, except as that prohibition is carried over and made applicable to the second by the words 'or shall in such pretended character demand', etc."

If the word "pretend" has the meaning ascribed to it by the court in King v. U. S., 279 Fed. 103, to-wit, "the putting forward of a false appearance of being officers", then there was no act on the part of petitioner in "keeping with the pretense". Whatever may be the conclusion as to whether petitioner claimed to be a representative of the Government or the TVA, there can be no doubt that he introduced himself as the editor and publisher of a newspaper, nor that the receipt then and there given for money paid to him was a receipt of the newspaper, signed by him as its editor, and not a pretended official receipt. Filling out a check, payable to this newspaper, not to any agency or representative of the Government, to be signed by the subscriber, and presenting it for such signature was not an act in "keeping with the pretense", if made, of being a Government or a TVA official, but the act of a newspaper representative.

The character of the acts, actually performed by petitioner, seem to have been entirely disregarded by Government counsel in the argument at page 22 of their brief. When the nature of these acts is considered, the evidence discloses nothing more than a verbal declaration of an official relation and not the performance of an apparent official act. This does not constitute a violation of the statute.

CONCLUSION.

A large part of the testimony of government witnesses is so inconsistent with the testimony they admit they gave at a former hearing or so self-contradictory as entirely to destroy its probative value. Johnson v. C. N. O. T. U. P. Ry. Co., 146 Tenn. 135, 157, 158, 240 S. W. 429.

But little, if any of it, presents a consistent, connected or reasonable description of the things said and done by petitioner. In but few instances, if any, does a government witness state either an impression or a conclusion based on the whole tenor of petitioner's utterances and acts in the solicitation of funds from the witness, but in the main the conclusion of each government witness is rooted and grounded in confusion or misunderstanding that resulted from his failure to consider petitioner's words and acts in their entirety.

In contrast to this weak and inconclusive evidence of the Government, petitioner presented direct and positive evidence, including unimpeached written instruments, that established almost to a mathematical certainty that he conducted his campaign as a representative of a newspaper and not as a pretended officer of the United States or the Tennessee Valley Authority.

The work in which he was engaged was his business, not for a day nor a week nor a month but from year to year, and it is inherently improbable that for the small amounts involved in the several counts of the indictment in this case, these aggregating $125, he would have incurred the risk incident to a false impersonation of an officer of the United States, and particularly when his business was being conducted with marked success without the slightest claim or pretense of federal authority.

Further emphasizing that improbability, we bring to the attention of this court an incident that occurred during the canvass of a county adjoining Gibson. One Yancey offered to increase his contribution in the sum of $150.00 if it would be taken into consideration when cheaper power was extended to his county. Upon this indication of confusion as to the work of petitioner, he immediately responded: "Wait a minute, Captain Yancey . . . *You do not understand . . . This is a donation for a publication*" (R. 242, 243).

If this were the only instance where petitioner made such an explanation when the prospect indicated confusion as to the scope and nature of petitioner's work, there might be some basis for the Government's contention (brief, p. 16) that he was making a "self-serving record" but as pointed out in our original brief (p. 17) in every instance where the prospect indicated a confusion as to the nature of his work petitioner promptly and expressly informed that prospect that he was soliciting funds for advertising and had no connection whatever with the Government.

Such evidence as the statement made to Yancey, being made in the general course of petitioner's business, and fairly contemporaneous with the proofs offered to establish fraudulent device and execution, was admissible in behalf of the accused. Wigmore on Evidence, Vol. 3, 3rd Ed., Sec. 1732; Worthington vs. U. S., 64 F2d 936 (C. C. A. 7). Mr. Wigmore has so thoroughly exploded the fallacy of the rule that formerly excluded material evidence in behalf of the accused on the ground that it was self-serving that we will not further discuss the government suggestion that petitioner was making a self-serving record.

It is not reasonably believable that petitioner would have in clear and explicit language explained to Yancey that he was making a "*donation for a publication*", this explanation involving an additional contribution of $150.00, a sum in excess of the total involved in the several counts of the indictment, and then pretend to the indictment witnesses, who made small contributions, that he was acting in the capacity of an officer of the United States.

The record presents a situation where a little group of disgruntled contributors, mainly residents of the same community, demanded a refund of their subscriptions, and, when this was refused, instituted civil suits and a criminal prosecution in the state courts of Tennessee, and thereafter brought their grievances to the attention of the federal authorities.

But prejudiced as they were, no government witness nor anyone else produced any substantial evidence that petitioner assumed to act as an officer of the Government or the Tennessee Valley Authority and we respectfully submit that petitioner, who, as the record shows, has already greatly suffered as a result of this prosecution, should not be deprived of his liberty on the flimsy evidence presented by the Government in this case.

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